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BERJAYA LAND BHD & ORS v. KERAJAAN NEGERI SELANGOR & ORS

HIGH COURT MALAYA, SHAH ALAM
SHAHNAZ SULAIMAN J
[JUDICIAL REVIEW NO: BA-25-8-03-2016]
23 JULY 2025

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Abstract – *(i) To be awarded compensation for a public body's failure to perform a public duty, a claimant must prove that the loss suffered was a direct and reasonably foreseeable consequence of that failure. A claim for losses based on events or approvals that are contingent on the decisions of a separate, independent body over which the public body has no control cannot be sustained, as the element of causation is broken; (ii) Claimants can only recover for losses that are demonstrably reasonable and directly attributable to the public body's inaction. If a claimant takes on a risk or makes a commercial decision on their own accord, they must bear the consequences of that decision, even if the decision was influenced by the public body's inaction.*

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CIVIL PROCEDURE: *Compensation – Assessment – Judicial review for failure of public authority to perform and exercise public duty – Federal Court ordered payment of compensation by public authority for losses suffered by applicants and inquiry into compensation be conducted by judge in chambers – Application by applicants for directions as to assessment of compensation at High Court – Assessment of compensation payable – Whether losses, costs and compensation claimed for proven – Quantum of damages – Whether pre-judgment and post-judgment interests ought to be awarded*

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The first applicant, Berjaya Land Bhd ('Berjaya Land'), was a company involved in the business of, *inter alia*, land development, construction, recreation and resort and hospitality. The second applicant, Berjaya City Sdn Bhd ('Berjaya City'), was the registered owner of the Bukit Tagar land and the third applicant, Selat Makmur Sdn Bhd ('Selat Makmur'), was the beneficial owner of the Sungai Tinggi land. Berjaya City had appointed AJM Planning and Urban Design Group Sdn Bhd ('AJM') as its agent to submit and obtain the relevant approvals for the purpose of: (i) the development of the 'Berjaya City' project; and (ii) the relocation and development of the Selangor Turf Equestrian and Sports Centre ('STC relocation') to two pieces of lands ('Sungai Tinggi lands'). The Pengarah Jabatan Perancangan Bandar dan Desa Negeri Selangor ('fifth respondent'), who was also the Secretary of the Selangor State Planning Committee ('Committee'), had informed that the Committee agreed or approved (i) the amendment to the concept plan for the development of the Berjaya City project in accordance with the conditions

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imposed by the Committee and further comments by the fifth respondent and the relevant local authorities; and (ii) the proposal for the development of the new centre for the purpose of the STC relocation ('February 2008 letter'). The fifth respondent, however, mentioned in the February 2008 letter that notwithstanding the approval of the STC relation proposal, such proposal had to be re-tabled for the consideration of the National Physical Planning Council ('NPPC') and thus requested that the latest amended concept plan be submitted to the fifth respondent. There was subsequently a general election in March 2008 and a new Menteri Besar of Selangor was appointed. Thereafter, the fifth respondent informed AJM that: (i) the fifth respondent would again present the decision of the Committee in approving the proposed amendment on the concept plan; and (ii) the proposed development of the new centre too had to be re-tabled for the reconsideration of the NPPC ('April 2008 letter'). In July 2011, the Selangor State Secretary told the first respondent that the Selangor State Executive Council ('EXCO') took cognisance of the STC relocation proposal and that the EXCO decided that the first respondent was to implement the 'Industrial and Business Scheme' project of the Bukit Tagar lands first before the proposal for the STC relocation was to be re-tabled for consideration. Berjaya City then submitted an application for planning permission for the implementation of the Industrial and Business Scheme on the Bukit Tagar lands. The applicants averred that Berjaya City had spent a total of RM182.73 million for this purpose. However, there was no further action by the first and fifth respondents with regard to the STC relocation proposal. This formed the subject matter of the application for judicial review. Following appeals, the Federal Court allowed the applicants' appeal and reinstated certain paragraphs of the High Court's order, namely ordering: (i) the first and fifth respondents to pay the applicants compensation for any losses suffered by the applicants in consequence of the first and fifth respondents' failure to perform their public duty from 2008 until the date of assessment ('compensation'); and (ii) an inquiry into the compensation be conducted by the judge in chambers and for this purpose, the applicants shall apply for directions as to the assessment of the compensation. Consequently, the applicants applied to this court for directions for the purpose of the assessment of the compensation payable by the first and fifth respondents. The assessment were founded on the following: (i) loss of profit in developing the Sungai Besi land in the amount of RM331,863,229 ('first heading'); (ii) increase in the cost of development/construction of the new equestrian centre at the Sungai Tinggi lands in the amount of RM801,610,000 ('second heading'); (iii) compensation paid to Selangor Turf Club for the extension of the SPA, in the amount of RM46 million ('third heading'); (iv) additional costs incurred for the development of 'Industrial and Business Scheme Project' in parts of the Bukit Tagar lands at the request of the first respondent,

in the amount of RM46,618,925.57 ('fourth heading'); and (v) 'loss of appreciation in land value' having development potentials and 'loss of opportunity' to develop lands in Bukit Tagar lands amounting to an area of 11,098.04 acres in the amount of RM1,591,244,600 ('fifth heading').

Held (ordering accordingly):

(1a) There was nothing in the cause papers filed by the applicants suggesting that the STC relocation proposal if re-tabled would be approved by the NPPC, or that the applicants had legitimate expectation that it would be approved. The applicants' grievance was founded solely on the ground that there was a failure on the part of the first and fifth respondents to perform their public duty, *ie*, to cause the STC relocation proposal to be re-tabled with the NPPC. It was not the case of the applicants that, but for the action or inaction of the NPPC, the applicants could not proceed with the development of the Sungai Besi lands. (paras 41 & 42)

(1b) The applicants did not have any interest in the development of the Sungai Besi lands except for the sale and purchase agreement ('SPA') which Selat Makmur had entered with the Selangor Turf Club. The SPA concerning the Sungai Besi lands was subject to certain conditions precedent which stipulated that, among others, the applicants must first secure the approval of the STC relocation to the Sungai Tinggi lands. Until and unless the conditions precedent of the SPA had been fulfilled, the applicants did not have any interest whatsoever over the Sungai Besi lands. The delay in the development of the Sungai Besi lands which must necessarily be founded upon the outcome of the NPPC's decision, could not be 'but for' the failure of the first and fifth respondents to perform their public duty. Similarly, it could not be reasonably foreseeable that the first and fifth respondents be held accountable for any delay in the development of the Sungai Besi lands which was premised upon the approval of the STC relocation proposal by the NPPC, since the first and fifth respondents did not have any control over the outcome of the NPPC re-tabling after it had been re-tabled. (paras 44 & 46)

(2b) The applicants had implicitly acceded to the proposition that there was no guarantee that the STC relocation proposal at the NPPC would be approved if re-tabled by the first and fifth respondents. The fate of the STC relocation proposal was still unclear. It was far from being reasonably foreseeable to say that the first and fifth respondents' inaction had caused the applicants to suffer more cost, particularly so when the applicants themselves were uncertain as to whether the NPPC would have approved the STC relocation. The applicants themselves were unsure as to the outcome of the NPPC's deliberation once the STC relocation proposal was re-tabled. (para 55)

(2c) The applicants' quantity surveyor failed to submit any accompanying architectural drawings or construction plans with their report. This omission prevented the first and fifth respondents from offering any meaningful response or evaluation of the proposed costs. (para 62)

(3) The acts of the applicants in agreeing to the extension consideration was not at all unreasonable. Instead, it could be said that in agreeing to the amount of RM3 million per annum, to be extended each and every year and not by way of a lump sum for numerous years, was a reasonable course of action which the applicants undertook. The applicants had averred that if, by letting the SPA be terminated, the applicants risked being accused of breaching the SPA and to pay damages to that effect. This was especially the case if one was to look into the light that the applicants now had the representations of the first and fifth respondents from time to time and the hope that the STC relocation would be re-tabled at the NPPC. (para 75)

(4) The lands were disposed on 11 August 2014 and 28 October 2014. According to the applicants, they had disposed of the disposed lands due to the 'uncertainty' of the STC relocation proposal. In other words, the applicants in exercising the option to sell off the disposed lands, had took into the necessary consideration including the viability of the project intended to be commenced on the Bukit Tagar lands as a whole. This was a risk the applicants must necessarily bear in making their commercial decision. Therefore, it could not be for the first and fifth respondents to be placed in a situation where they would have to bear the consequence of certain actions which the applicants chose to take on their own accord. By their conduct, the applicants must bear any risk that must necessarily ensue. (paras 96 & 97)

(6) The applicants' claim under the first, second and fifth headings were dismissed. The applicants' claim under the third and fourth headings, were allowed. For the third heading, the applicants' claim in the amount of RM36 million ought to be allowed. For the fourth heading, the applicants were entitled to a nominal damage of an amount of RM2,330,946.30. (paras 52, 65, 78, 90)

(7) The Federal Court did not order for a pre-judgment interest to be awarded. The applicants should not be entitled for the pre-judgment interest on the ground that the applicants' claim against the first and fifth respondents was in relation to the failure on the part of the first and fifth respondents to exercise their public duty. This was not a case where the claim was founded upon the breach of contractual duty or tort. Until the decision of the Federal Court, the parties' position as to their respective liability was unsettled. The first and fifth respondents could not be liable to pay interests upon such damages that they were not aware that they were liable for. (para 103)

(8) Order 42 r. 12 of the Rules of Court 2012 provides that all judgment debts shall carry interest to be calculated from the date of judgment until the judgment is satisfied. Post-judgment interest was allowed. The first and fifth respondents were ordered to pay interest at the rate of 5% per annum chargeable on the judgment debt to be calculated from the date of assessment until the date of full settlement thereof. Costs were to be payable by the parties. (paras 104 & 105)

Case(s) referred to:

Aviation Development Corporation (M) Sdn Bhd v. Yayasan Selangor [2022] 4 CLJ 165 FC ***(refd)***

Bonham-Carter v. Hyde Park Hotel Ltd [1948] 64 TLR 177 ***(refd)***

Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 CLJ 19 HC ***(refd)***

Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd [2014] 6 CLJ 269 FC ***(refd)***

Kartik Purosothmen v. Mohd Ferdaus Mohamad Asri & Ors [2025] 7 CLJ 1001 HC ***(refd)***

Kerajaan Malaysia v. Batu Kemas Industri Sdn Bhd [2024] CLJU 3215 CA ***(refd)***

Lim Tze Sian v. Coverright Surface Malaysia Sdn Bhd [2017] 5 CLJ 150 CA ***(refd)***

National Feedlot Corporation Sdn Bhd & Ors v. Public Bank Bhd [2023] 10 CLJ 430 CA ***(refd)***

PDI Design & Associates Sdn Bhd lwn. Sitrac Corporation Sdn Bhd [2023] 2 CLJ 911 CA ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

Yayasan Selangor v. Aviation Development Corporation (M) Sdn Bhd [2020] 7 CLJ 529 CA ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 11

Rules of Court 2012, O. 42 r. 12, O. 53 r. 3

For the applicants - Tey Jun Ren & Siew Suet Mey; M/s JR Tey & Co

For the respondents: Kamaruzaman Muhammad Arif & Sofiah Omar; T/n Kamaruzaman Arif & Sofiah

Reported by Lina E

JUDGMENT

Shahnaz Sulaiman J:

Introduction

[1] The Federal Court allowed the applicants' appeal on 30 October 2023. The Federal Court reinstated certain paragraphs of the High Court's Order dated 9 November 2017 ("High Court's order"). Among the paragraphs reinstated, the first and fifth respondents are ordered to pay the applicants compensation for any loss suffered by the applicants in consequence of the first and fifth respondents' failure to perform their public duty from year 2008 until the date of assessment ("compensation").

[2] The Federal Court had also reinstated paras. 9 and 10 of the High Court's order to the effect that an inquiry into the compensation be conducted by the judge in chambers and for this purpose, the applicants shall apply for directions as to the assessment of the compensation.

[3] Consequentially, the applicants applied to this court for directions for the purpose of the assessment of the compensation payable by the first and fifth respondents.

[4] The parties agreed that the assessment of the compensation be conducted by way of affidavits to be exchanged between both the applicants and the first and fifth respondents, subject to the condition that where any of the parties deemed necessary, the deponents of their respective affidavits be allowed to be called forward and be cross-examined by the other party. In light that learned counsel for both the parties have indicated to this court that they wished to cross-examine certain expert witnesses, two hearing dates were allocated for such purpose.

[5] On the hearing dates, parties however changed their mind and opted not to call anyone for the purpose of cross-examination. The assessment of compensation payable by the first and fifth respondents therefore proceeded on the affidavits filed and relied upon by both the parties in their respective written and oral submissions.

[6] This is the outcome of such assessment.

Factual Background

[7] The first applicant ("Berjaya Land") is a public listed company and is in the business of, amongst others, land development, construction, recreation and resorts, hospitality and other services.

[8] The second applicant ("Berjaya City") is the registered owner of the Bukit Tagar land, and the third applicant ("Selat Makmur") is the beneficial owner of the Sungai Tinggi land.

[9] Berjaya City appointed AJM Planning and Urban Design Group Sdn Bhd ("AJM") as its agent to submit and obtain the relevant approvals for the purpose of:

(i) development of the "Berjaya City" project ("Berjaya City project"); and

(ii) the relocation and the development of the Selangor Turf Club Equestrian and Sports Centre ("STC relocation") to two pieces of lands which the applicants termed as the "Sungai Tinggi land", held under title No. HSD 52463, No. PT 4622 ("Lot 4622") and No. HSD 52477, No. PT 4636 ("Lot 4636") respectively, both under the Mukim of Sungai Tinggi and the District of Ulu Selangor ("Sungai Tinggi lands"). Lot 4622 and Lot 4636 were respectively part of the wider lands held under title No. GRN 46261, Lot 15 and No. GRN 39947, Lot 26, which had since been subdivided.

Berjaya City Project

[10] The Berjaya City project was intended to be developed on all pieces of lands which the applicants termed as "Bukit Tagar land" ("Bukit Tagar lands"). Bukit Tagar lands cover certain lands under the district of Ulu Selangor as well as the district of Kuala Selangor, and include the Sungai Tinggi lands.

Selangor Turf Club Relocation ("STC Relocation")

[11] Berjaya City is the registered proprietor of the Sungai Tinggi lands. The third applicant, Selat Makmur Sdn Bhd ("Selat Makmur") has a beneficial ownership over the said Sungai Tinggi lands. Selat Makmur had on 19 July 2004 entered into a sale and purchase agreement ("SPA") with the Selangor Turf Club ("Selangor Turf Club"). The preamble of the SPA stated that the Selangor Turf Club intended to relocate its premises on the ("Sungai Besi lands") and its horse-racing activities, to a new location.

[12] Selat Makmur had agreed to cause to be erected upon the Sungai Tinggi lands a modern racecourse with equestrian sports centre and other ancillary buildings ("new centre") for the benefit of the Selangor Turf Club, for the purpose of the STC relocation, and thereafter to sell such Sungai Tinggi lands together with the new centre to Selangor Turf Club.

[13] In consideration thereof, the Selangor Turf Club agreed to sell the Sungai Besi Lands to Selat Makmur for consideration in the amount agreed by both parties.

[14] The SPA is subjected to a number of conditions precedent. Among others, the parties are to obtain necessary approvals for the purpose of the STC relocation. The conditions precedent of the SPA shall be fulfilled by the parties therein within a period of six months from the date of the SPA, with an automatic extension of another three months, and upon the aforementioned conditional period being lapsed, the SPA shall terminate unless extended by the written consent of both the Selangor Turf Club and Selat Makmur.

[15] Selat Makmur then appointed Berjaya City as turnkey contractor to complete the erection of the new centre who, in turn, as mentioned earlier, appointed AJM to submit the relevant application to the relevant authority.

The Applications By AJM

[16] On 11 February 2008, the fifth respondent who is also the Secretary of the Selangor State Planning Committee ("Committee") through its letter ("February 2008 letter") informed that the Committee had in its meeting No. 1/2008 convened on 28 January 2008 decided that the Committee agreed or approved:

(i) the amendment to the concept plan for the development of the Berjaya City project in accordance with the conditions imposed by the Committee and further comments by the fifth respondent and the relevant local authorities; and

(ii) the proposal for the development of the new centre for the purpose of STC relocation.

[17] The fifth respondent however mentioned in the February 2008 letter that notwithstanding that the STC relocation proposal had been approved, such proposal has to be re-tabled for the consideration of the National Physical Planning Council ("NPPC"), and thus requested that the latest amended concept plan be submitted to the fifth respondent.

[18] It is notable to mention that there was subsequently a general election held on 8 March 2008 and a new Menteri Besar of the Selangor was appointed.

[19] Thereafter, in its letter dated 20 April 2008 ("April 2008 letter"), the fifth respondent informed AJM that:

(i) the fifth respondent will again present the decision of the Committee in approving the proposed amendment on the concept plan back in 28 January 2008 in the upcoming meeting of the Committee; and

(ii) the proposed development of the new centre for the STC relocation too has to be re-tabled for the reconsideration of the NPPC.

[20] The April 2008 letter required AJM to submit the comments of the relevant technical departments for the purpose of approval of the proposed amendment on the concept plan. The Federal Court had made a clear finding of fact that "the correspondence between the parties discloses clearly that an amended concept plan was in fact submitted".

[21] On 7 July 2011, through a letter entitled "Cadangan Pemindahan Pusat Ekuestrian Dan Sukan Selangor Turf Club (STC) Sungai Besi ke Sungai Tinggi, Hulu Selangor" ("2011 letter"), the Selangor State Secretary told the first respondent that the Selangor State Executive Council ("EXCO") took cognisance of the STC relocation proposal, and that the EXCO decided that the first respondent was to implement the "Industrial and Business Scheme" project ("Industrial and Business Scheme") on the Bukit Tagar lands first, before the proposal for STC relocation was to be re-tabled for consideration.

[22] Acting upon such "additional expectation", Berjaya City submitted an application for planning permission for the implementation of the Industrial and Business Scheme on the Bukit Tagar lands. The applicants averred that Berjaya City had spent a total of RM182.73 million for the purpose of the "Industrial and Business Scheme" project.

[23] However, despite efforts being made on the part of the applicants, there was no further action by the first and fifth respondents with regard to the STC relocation proposal. This formed the subject matter of the application for judicial review.

[24] The Federal Court affirmed the High Court's findings that "This re-tabling before the NPPC was never done" and found that "this is a *lacuna* that needs to be addressed". The Federal Court then allowed the appeal and as mentioned earlier, certain paragraphs of the High Court's order were reinstated including among others, the first and fifth respondents are ordered to pay the applicants the compensation from year 2008 until the date of assessment.

[25] The applicants raised several heads of claim which they averred that they are entitled to in consequence of the failure on the part of the first and fifth respondents in the performance of their public duty. They are:

(i) loss of profit in developing Sungai Besi lands;

(ii) increase in costs of construction of the new centre for the STC relocation at the Sungai Tinggi lands;

(iii) annual compensation paid to Selangor Turf Club for the extension of the SPA;

(iv) additional costs incurred in implementation of the "Industrial and Business Scheme" in part of the Bukit Tagar lands; and

(v) loss of appreciation in land value and loss of opportunity to develop lands in Bukit Tagar lands amounting to an area of 11,969.09 acres that Berjaya City disposed at a much lower value due to the uncertainty of the STC relocation proposal arising out of the failure, action or inaction of the first and fifth respondents.

Principle Surrounding Assessment Of Damages In Judicial Review

[26] It is trite that damages should be assessed in a manner such that the aggrieved party upon being compensated by money, is able to restore the party to the same position as he would have been, if not for the wrong suffered. Such objective is the same whether the damage suffered is attributable to breach of contract or tort. As Edgar Jospeh Jr SCJ found in *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 1 CLJ 19, at p. 57:

> The general rule as to the measure of damages, a rule equally applicable to tort as to contract, was defined by Lord Blackburn in *Livingstone v. Rawyards Coal Co.* [1980] 5 App Cas 25 at 39 in these terms:
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> > that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation.

In *Munnelly v. Calcom* [1978] IR 387 Henchy J said at p. 399 A

> the particular measure of damages allowed should be objectively chosen by the court as being that of the particular case, to put the plaintiff fairly and reasonably in the position in which he was before the damage occurred, so far as pecuniary awards can do so.

[27] The court in assessing the damages payable has a duty to identify the B real nature of the applicants' cause of action. Edgar Joseph JR SCJ had in the case of *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15, FC found that at pp. 20 and 21:

> Secondly, it is important to identify the real nature of the purchaser's cause of action. C
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> In the event, the purchaser did succeed to obtain title to the land, although belatedly, and after forcing the hand of the Vendor, by way of an order for specific performance, but without recourse to the Loan Undertaking. This leads to the inevitable conclusion that the purchaser's true cause of action was for damages for delay in delivering title as a result of the wrongful termination of the Agreement by the Vendor. D
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> In such a situation, neither undertaking was of anything more than historic interest; the Loan Undertaking was a breach without consequence, no evidence having been led as to what, if any loss, had been occasioned thereby; whilst the Joint Venture Undertaking was inoperative and of no effect. E
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> Accordingly, the assessment of damages in this case should be arrived at having regard to the loss, if any, which the purchaser had suffered and proved, by reason of it not having obtained title to the land until after the order for specific performance passed by the High Court had on appeal been affirmed by the Supreme Court. It is vitally important that this point be kept in the forefront of our minds as failure to do so will lead to confusion and injustice. F G

[28] With regard to the principles applicable in the assessment of the different heads of claim the injured party is trying to establish, Edgar Joseph Jr SCJ further found in *Cheng Hang Guan* (*supra*) the following at p. 57 and 58:

> Firstly, when a plaintiff claims damages from a defendant he has to show H that the loss in respect of which he claims damages was caused by the defendant's wrong and also that the damages are not too remote to be recoverable.
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> Secondly, I would refer to what Lord Goddard said in *Bohham-Carter v. Hyde Park Hotel Ltd* [1984] 64 TLR 177 at 178: I

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it.
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> Thirdly, on the quality of evidence expected of a plaintiff, it is necessary to remember what Devlin J (as he then was) said in *Biggin Co v. Permanite* [1951] 1 KB 422 at 438, namely, that where precise evidence is obtainable the court naturally expects to have it, where it is not, the court must do the best it can. Nevertheless, it remains true to say that that generally difficulty of proof does not dispense with the necessity for proof. (See *Aerial Advertising Co. v. Batchelors Peas* [1938] 2 All ER 788 at p. 796 per Atkinson J). The case of *Ashcroft v. Curtin* [1971] 1 WLR 1713 illustrates this point for there the plaintiff claiming for diminution of profits of his one-man business failed in his claim despite the evidence pointing to a decrease in the company's profitability due to the injury, the records relied on being too rudimentary and the accounts too unreliable to quantify the loss.

(see also *Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd* [2014] 6 CLJ 269 at paras. [31]-[33]; *National Feedlot Corporation Sdn Bhd & Ors v. Public Bank Bhd* [2023] 10 CLJ 430; *PDI Design & Associates Sdn Bhd lwn. Sitrac Corporation Sdn Bhd* [2023] 2 CLJ 911 at para [85]; *Kartik Purosothmen v. Mohd Ferdaus Mohamad Asri & Ors* [2025] 7 CLJ 1001).

[29] In the case of *Kerajaan Malaysia v. Batu Kemas Industri Sdn Bhd* [2024] CLJU 3215 where Choo Kah Sing JCA speaking for the Court of Appeal had the occasion to say:

> [41] Although the learned High Court judge was satisfied that damage to the brake motor and transformer had been proven and that technical advice was rendered, that goes to proving liability, not proving damages. Therefore, the learned High Court judge could not for that reason arbitrarily allow the claims which were supported by "ID" documents. This clearly goes against the rules of evidence in proving one's losses and damages.
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> [44] Batu Kemas' counsel submitted that "there was ample evidence from the documents marked as exhibits, and corroborated by oral testimony of Batu Kemas' witnesses, to show that Batu Kemas was entitled to those heads of claim." This Court opines that Batu Kemas could have well proved its entitlement to those heads of claim, but that does not translate to the amount of damages to be awarded. To prove the entitlement to a compensation amount is distinct from proving entitlement to the heads of claim. This Court could agree that Batu Kemas had suffered loss and damage, but whether Batu Kemas was entitled to claim the amount of the compensation still depended on what documentary evidence had been

admitted as evidence for consideration of the court. The evidence before the court could not include documents marked as "ID" or indirect documentary evidence suggesting potential losses and damages.

[30] Another aspect in the assessment of damages as could be gleaned from the case of *Cheng Hang Guan* (*supra*) is that the damages sought must not be too remote. As Mary Lim JCA (as she then was) found in the case of *Lim Tze Sian v. Coverright Surface Malaysia Sdn Bhd* [2017] 5 CLJ 150, CA:

> [6] … We agreed with the submissions of the appellant's counsel that the respondent had failed to prove the losses suffered and had further failed to prove that the losses suffered were indeed attributable to the acts of the appellant. The element of causation was still relevant in relation to the assessment of damage, that the respondent had to prove that the particular damage or loss claimed was caused by or attributable to the appellant. Since the respondent failed to do that, the issue of rebuttal by the appellant did not arise. …
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> [21] Had the learned judge examined this issue properly, it would have been quite apparent that while the appellant's liability to pay was a non-issue by reason of the interlocutory judgment entered on 1 October 2012, his liability to pay for any damage and any amount reflective of that damage, is still subject to proof. Proof is not a simple matter of amount but a satisfaction of all the other elements of causation, remoteness and, mitigation. Damage or the existence of damage must be proved as a matter of fact; and the amount of that damage must be proved, through oral or documentary evidence, or both. As mentioned earlier, hearsay remains hearsay, whether it was orally presented or through documentary evidence; and it must be disregarded.
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> [22] In this instance, had the SAR's decision been properly scrutinised, it will become readily obvious that what the SAR had done was effectively to accept and treat the order on liability to pay as good or effective on the issue of the appellant's liability to pay the amount claimed by the respondent. Nowhere in the grounds of the learned SAR's decisions is there any indication of a real evaluation of the evidence, which was all by affidavit and was necessarily documentary, given the directions of the SAR himself. Had that been done, it will be seen that the burden of proving loss was never discharged by the respondent. The burden which remained with the respondent at all times since it was its case to prove on a balance of probabilities, never shifted to the appellant. When the burden is not discharged, there is no question of rebuttal required from the appellant. Had the learned SAR realised the correct position in law and, what was required in terms of evidence, the order for general damages would never have been allowed.

[31] Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd* [1948] 64 TLR 177 and was quoted in the Malaysia case Federal Court of *Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd* [2014] 6 CLJ 269 as follows:

A [32] It is trite law that a claimant claiming damages must prove that he has suffered the damage. The claimant has the burden of proving both liability and quantum of damages, before he can recover the sum claimed. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a particular allegation forms an essential part of a person's case, the proof B of such allegation falls on him. (See s. 103 of the Evidence Act 1950). If he fails to prove both the liability and the quantum of damages, he loses the action.

[33] Therefore, in a claim for damages, it is not sufficient for the plaintiff to merely state the amount of damages that he is claiming, he must prove C the damage that he had in fact suffered to the satisfaction of the court. This principle is borne out in the case of *Bonham-Carter v. Hyde Park Hotel* [1948] 64 TLR 177 where Lord Goddard CJ observed: Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have D lost, I ask you to give me these damages'. They have to prove it.

[32] In *Aviation Development Corporation (M) Sdn Bhd v. Yayasan Selangor* [2022] 4 CLJ 165; [2022] 3 MLJ 89, the Federal Court affirmed, among other things, that the legal principle applied by the Court of Appeal in assessing damages was the correct approach. This principle was originally set E out by the Court of Appeal in *Yayasan Selangor v. Aviation Development Corporation (M) Sdn Bhd* [2020] 7 CLJ 529; [2019] MLJU 650:

where precise evidence is available, the party seeking damages must provide it to show the actual loss. In other words, the best evidence available must be produced. The evidence produced must therefore be reliable and accurate so that the loss can be F *quantified with reasonable precision and certainty* (see *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; *Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2011] 1 LNS 232; [2011] 5 MLJ 1; *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 1 CLJ 611; [2007] 2 MLJ 229 and *Wasal Construction Sdn Bhd v. Boh Huat Chan Timber Products Sdn Bhd* [2013] 1 LNS 1269; G [2014] 4 MLJ 294). (emphasis added)

[33] Founded on these principles, this court will determine the assessment of damages in this judicial review.

Assessment Of Compensation

H **[34]** The assessment of the compensation payable by the first and fifth respondents will be founded upon the foregoing principles.

Loss Of Profit In Developing The Sungai Besi Land (RM331,863,229)

[35] The applicants claim that the respondents' prolonged delay, since I 2008, in re-tabling the proposal to relocate the STC from the Sungai Besi land to Sungai Tinggi land has caused an increase in development costs. As a

result, the applicants suffered a loss of profit in developing the Sungai Besi land in 2024 compared to if they had been able to proceed in 2008. The delays prevented the applicants from moving forward with the development until the STC was relocated.

[36] The applicants through their affidavit in support (encl. 133) averred that the Federal Court had made a finding on the issue of liability in favour of the applicants, over the failure on the part of the first and fifth respondents in the performance of their public duty. The applicants further averred that the applicants are in consequence thereof prevented from commencing the development of the Sungai Besi lands since the year 2008. Cost of construction, according to the applicants, have raised significantly since then.

[37] In order to proof their quantum, the applicants sought to rely on the expert opinion of their appointed valuer, Messrs CBRE WTW Valuation & Advisory Sdn Bhd ("CBRE"). CBRE had employed the method of "Income Approach (Residual Method)", which is based on the difference between the gross development value ("GDV") of the project and the costs incurred (termed as gross development cost). The difference between the GDV and the gross development cost is then the profit derived in a given year.

[38] CBRE then calculated the GDV of the development of the Sungai Besi lands based on the value of the buildings within the vicinity such as apartments, condominiums, bungalow and commercial shop lots, for year 2008, and multiply them with the number of units the applicants intended to develop on the Sungai Besi lands. The same is also done for year 2024. From these CBRE is able to ascertain the profits for the respective years. The difference between the profit for year 2024 and the profit for year 2008 is then derived and this forms the claim under this head.

[39] In conclusion, applicants averred that they are entitled to the loss of profit under this head, an amount of RM331,863,229.

[40] Bearing in mind the *dicta* of Edgar Joseph J SC in the case of *Tan Sri Khoo Teck Puat* (*supra*), this court must identify the true nature of the cause of action of the applicants in the instant application for judicial review. The statement filed pursuant to O. 53, r. 3 of the Rules of Court 2012 and the affidavits exchanged revealed quite clearly that the cause of action of the applicants is the failure on the part of the first and fifth respondents to re-table the STC relocation proposal to the NPPC. The argument of legitimate expectation is also premised upon such cause of action. The decision of the Federal Court in allowing the appeal and reinstating certain paragraphs of the High Court's order, appear to have relied on the fact that there is a want of performance of public duty on the part of the first and fifth respondents in re-tabling the STC relocation proposal with the NPPC.

[41] There is nothing in the cause papers filed by the applicants suggesting that the STC relocation proposal if re-tabled will be approved by the NPPC, or that the applicants have legitimate expectation that it will be approved. It bears repetition that the applicants' grievance is founded solely on the ground that there is a failure on the part of the first and fifth respondents to perform their public duty, *ie*, to cause the STC relocation proposal to be re-tabled with the NPPC.

[42] It is not the case of the applicants that, but for the action or inaction of the NPPC, the applicants cannot proceed with the development of the Sungai Besi lands. The applicants' cause of action in the instant judicial review application is against the first and fifth respondents. Based on the affidavits available, the applicants did not dispute that the first and fifth respondents will eventually be bound by the decision of the NPPC in respect of the STC relocation proposal regardless of the decision of the NPPC.

[43] The foregoing observation is crucial because one must not overlook the fact that the Sungai Besi lands are owned by the Public Trust upon trust for the benefit of the Selangor Turf Club. This is evident from the land searches of the Sungai Besi lands annexed with the report prepared by CBRE.

[44] The applicants do not have any interest in the development of the Sungai Besi lands except for the SPA which Selat Makmur had entered with the Selangor Turf Club. It must be reiterated that the SPA concerning the Sungai Besi lands are subject to certain conditions precedent which stipulated that, among others, the applicants must first secure the approval of the STC relocation to Sungai Tinggi lands. The provisions of the SPA are only effective upon fulfilment of the conditions precedent, as stated in cl. 2.1 of the SPA which reads:

> The provisions of this Agreement (save for the Effective Clauses) are conditional upon the fulfilment of the following conditions within the Conditional Period …

[45] The term "effective clauses" had been defined in the SPA, and does not cover cl. 3 of the SPA which is a clause that governs the sale and purchase of the Sungai Besi lands. In short, cl. 3 of the SPA is not effectual at this moment and the applicants cannot proceed further – including to acquire the Sungai Besi lands – until and unless the conditions precedent have been fulfilled.

[46] Therefore, until and unless the conditions precedent of the SPA has been fulfilled, this court opines that the applicants do not have any interest whatsoever over the Sungai Besi lands. The courts which heard the matter and/or its appeal did not hold that NPPC is liable for any failure to perform public duty. It follows therefore that the delay in the development of the

Sungai Besi lands which must necessarily be founded upon the outcome of the NPPC's decision, and cannot be "but for" the failure of the first and fifth respondents to perform their public duty. Similarly, it cannot be reasonably foreseeable that the first and fifth respondents be held accountable for any delay in the development of the Sungai Besi lands which is premised upon the approval of the STC relocation proposal by the NPPC, since the first and fifth respondents do not have any control over the outcome of the NPPC re-tabling after it has been retabled.

[47] Other than that, it can be observed that as evident from the report prepared by CBRE, there is no approval and/or planning permission being adduced to support the proposition that the applicants will be able to develop the Sungai Besi lands into the scale which CBRE claimed to be in their export report. The applicants have yet to obtain any planning permission. This court opines it is far fetching for the applicants to claim at this juncture that they have suffered loss of profit over the development of the Sungai Besi lands.

[48] Moreover, it is observed that the valuation report prepared is based on the valuer's assumptions that the applicants had secured all necessary approvals for their proposed development. This assumption underpins both the report and the amount of damages claimed. This point is addressed in the applicants' valuation report.

[49] Therefore, as the basis of the applicant's valuation report is the assumption that all necessary approvals had been obtained, and as the applicant had not obtained the necessary approvals, the valuation report of the applicant is flawed and ought not to be considered by this court.

[50] In this regard, it is most crucial to emphasise the established legal principle concerning the burden of proof in the assessment of damages. It is well settled that the party awarded damages by a court judgment carries the burden or responsibility of proving the loss or damage they have sustained. In other words, it is incumbent upon the applicant to furnish credible and sufficient evidence to substantiate their claims for damages.

[51] Conversely, the first and fifth respondents are under no obligation to prove the absence of such losses. Their role is limited to challenging or rebutting the applicants' evidence, which may include presenting contrary evidence or highlighting weaknesses or inconsistencies in the applicants' case. The evidentiary burden, however, remains firmly on the applicants throughout.

[52] In light that the applicants had failed to proof the damages they suffered under this heading, and premised upon the principles identified above, this court opines therefore that the claims under this heading must necessarily fail.

Increase In Cost Of Development/Construction Of The New Equestrian Centre At The Sungai Tinggi Lands (RM801,610,000)

[53] Under this heading, the applicants sought to be compensated a total amount of RM801,610,000. In arriving to such figure, the applicants relied on the calculation provided by their appointed quantity surveyor, Messrs Yong dan Mohamad Faiz Sdn Bhd ("Yong and Mohamad"). The calculation done by Yong and Mohamad is based on the difference between the preliminary estimate and cost plan for year 2008 and year 2024 respectively.

[54] At the outset, it is observed that the claim of the applicants under this heading requires the necessary approval from the relevant authority regarding the STC relocation proposal and the erection of the new centre at the Sungai Tinggi lands. The applicants in making its claim under this ground appear to have treated the STC relocation proposal as approved by the NPPC.

[55] From the cause papers filed, it can be gleaned that the applicants had implicitly acceded to the proposition that there is no guarantee that the STC relocation proposal at the NPPC will be approved if re-tabled by the first and fifth respondents. The fate of the STC relocation proposal is still unclear. It is therefore the view of this court, far from being reasonably foreseeable, to say that the first and fifth respondents' inaction had caused the applicants to suffer more cost, particularly so when the applicants themselves are uncertain as to whether the NPPC would have approved the STC relocation.

[56] In this regard, reference is made to the applicants' written submissions at para. 73.2 (p. 39 of encl. 159) which is reproduced below:

> … means that the possibility of having horse racing activity in the New Equestrian Centre is not closed and can only be appropriately dealt with once the proposal has been re-tabled.

[57] The former part of the above quoted passage indicate to this court that the applicants themselves too are unsure as to the outcome of the NPPC's deliberation once the STC relocation proposal is re-tabled.

[58] Even if one is to take a step further and assume that the NPPC would approve the STC relocation, it must be borne in mind that the STC relocation is nothing but an exercise of commercial activity by the applicants. The applicants, being an entity exercising their discretion in their commercial sense, are at the liberty to choose whether to proceed with the project or otherwise. The possibility that the applicants exit the project altogether should the applicants find that it is not commercially viable to proceed with the project, cannot be ruled out. This is especially so bearing in mind that the applicants are a conglomerate with sufficient resources to obtain necessary advice from the relevant experts. Should the applicants decide to take on with the STC relocation after it has been approved by the NPPC

(assuming so), the applicants can be said to have done so on their own volition. Thus, it cannot be that the commercial risks which the applicants ought to have borne be shifted to the first and fifth respondents.

[59] On the other hand, the first and fifth respondents who are bound by the High Court's order to re-table the STC relocation approval, have no part over the outcome of the NPPC's decision. In the event, the NPPC's decision does not favour the applicants, should the first and fifth respondents be ordered to pay the difference between the construction costs for year 2008 and year 2024, the applicants will effectively be unjustly enriched and find themselves in a much better position compared to when they are not wronged. This is wholly in contrary to the established principle governing assessment of damages. (See *Tan Sri Khoo Teck Puat* (*supra*)).

[60] The claim under this head should therefore be disallowed. In light that the applicants do not satisfy the threshold to prove that they are entitled to claim under this head, it is not necessary to consider the reply and/or rebuttal of the first and fifth respondents. (See: *Coverright Surface* (*supra*)).

[61] Attention must however be made, to the attempt of the first and fifth respondents in relying on the various correspondence from the letter of the Menteri Besar of Selangor or the letters from the fifth respondents to rebut the claims of the applicants under this head. As stated earlier, the assessment of the compensation payable to the applicants are premised upon the cause of action of the applicants that it concerns the failure on the part of first and fifth respondents to re-table the STC relocation proposal at the NPPC. It matters not what the opinion of the Menteri Besar of Selangor or the fifth respondent or the Committee. In any event, the reliance by the first and fifth respondents are of no relevance following the finding above that the applicants are not entitled to the claim under this heading.

[62] The cost assessment provided by the applicants' quantity surveyor (QS) is fundamentally flawed as no approved development plan exists, rendering the details and figures contained in the QS report (exh. OW2, encl. 139) speculative and entirely unfounded, amounting to nothing more than conjecture on the part of the applicants.

[63] Furthermore, the applicants' QS failed to submit any accompanying architectural drawings or construction plans with their report. This omission has prevented the first and fifth respondents from offering any meaningful response or evaluation of the proposed costs.

[64] It is also worth noting that the drawing referenced by the applicants' QS pertains to a 2012 proposal, while the cost estimates cited are based on 2024 pricing. As such, any cost comparison drawn between the years 2008 and 2024 by the applicants is purely hypothetical and lacks the necessary supporting documentation, particularly detailed and updated drawings, to lend it credibility.

[65] In short, the applicants' QS report had failed to proof the damages the applicants suffered under this heading, and premised upon the principles identified above, this court opines therefore that the claims under this heading must fail.

Compensation Paid To Selangor Turf Club For The Extension Of The SPA (RM46,000,000)

[66] The SPA entered between the Selangor Turf Club and Selat Makmur is conditional upon the fulfilment of certain conditions stipulated therein, within a period of six months with an automatic extension of a further three months, making the conditional period a total of nine months from the date of SPA of 19 July 2004. The SPA further stipulated that parties may by agreement in writing extend the conditional period. This the parties therein had done, however there was a change of event whereby both Selat Makmur and Selangor Turf Club had entered into a supplemental agreement dated 13 August 2012 ("supplemental agreement"). Since then, every year, upon the agreement of the Selangor Turf Club, the applicants had been paying an amount of RM3,000,000 in consideration of the Selangor Turf Club's agreement to extend the conditional period from the 19 January every year until the 18 January of the immediate subsequent year ("extension consideration").

[67] Selat Makmur had been granted extension of time by the Selangor Turf Club every year from the year of 2013 up until the date of assessment, which is the year 2025. A total of twelve years has lapsed, and the total compensation the applicants are claiming under this head is a total of RM36,000,000 as revised in their submissions. This is the total amount Selat Makmur had paid to the Selangor Turf Club throughout the years.

[68] The applicants averred that due to the failure on the part of the first and fifth respondents in respect of the performance of their public duty, the applicants risked breaching the terms of the SPA. In consequence to that, the applicants have no choice but to enter into the supplemental agreement.

[69] The cause of action of the applicants as well as the reason leading the Federal Court to decide the appeal the way as it now presents, is that there had been failure on the part of the first and fifth respondents to re-table the STC relocation proposal to the NPPC.

[70] The first and fifth respondents had through their February 2008 letter, April 2008 letter and 2011 letter impressed upon the applicants that they will re-table the STC relocation proposal at the NPPC. It was never the case of the first and fifth respondents that the re-tabling would not be done. In fact, the first respondent through the 2011 letter had informed the applicants that the EXCO require the applicants to proceed with the Industrial and Business Scheme first before the STC relocation proposal will be considered. There

is no indication in the 2011 letter that the STC relocation would not be re-tabled at the NPPC. Based on this 2011 letter the applicants did in fact proceed to submit the necessary application for the implementation of the Industrial and Business Scheme. This indicated that the applicants had indeed acted upon the representation of the first respondent, with the hope and belief that the STC relocation proposal will be re-tabled.

[71] It can therefore be deduced that but for the representations of the first and fifth respondents from time to time, the applicants would not have proceeded to agree with the Selangor Turf Club for the extension of the conditional period of the SPA, and to pay the extension consideration to that effect. The applicants had adduced payment proof for the payments of the extension consideration.

[72] In their rebuttal, the first and fifth respondents averred that since there is no approval for the STC relocation proposal, and that there is no application in relation to the development of the Sungai Besi lands, the applicants' claim under this head should be rejected in toto. The first and fifth respondents too averred that the extension consideration were agreed on the presumption that the STC relocation approval will be approved.

[73] This court is satisfied that the applicants would not have agreed upon the extension consideration but for the representations and hope given by the first and fifth respondents from time to time that the STC relocation proposal will be re-tabled. It requires no repetition that the extension consideration only came into picture after the 2011 letter issued by the State Secretary of the first respondent, which further bolstered the issue of causation between this head of claim and the failure on the part of the first and fifth respondents in the exercising of their public duty.

[74] The fifth respondents being the secretary of the Committee cannot be ignorant of the fact that the STC relocation involved the relocation of the premises of the Selangor Turf Club from Sungai Besi lands to the Sungai Tinggi lands. It is therefore not at all remote for the first and fifth respondents to know that, if the first and fifth respondents did not act promptly in doing what they should have done for the purpose of the retabling of the STC relocation proposal, there would be repercussion on all the parties concerned including the Selangor Turf Club. The first and fifth respondents however willingly turn a blind eye and neglected in the prompt performance of public duty. They cannot now attempt to plead ignorance and escape from liability.

[75] In the view of this court, the act of the applicants in agreeing to the extension consideration is not at all unreasonable. Instead, it can be said that in agreeing to the amount of RM3,000,000 per annum, to be extended each and every year and not by way of a lump sum for numerous years, is a reasonable course of action which the applicants took. The applicants have averred that if by letting the SPA terminated, the applicants risked being

accused of breaching the SPA and to pay damages to that effect. This is especially the case if one is to look into the light that the applicants now have the representations of the first and fifth respondents from time to time and the hope that the STC relocation will be re-tabled at the NPPC.

[76] The fact is that the applicants under this heading are merely claimed for the amount they had in fact incurred, and the applicants are not claiming other head of damages such as exemplary or aggravated damages.

[77] The rebuttal of the first and fifth respondents did not touch upon the issue of quantum. In fact, there are no averment on the part of the first and fifth respondents that the amount of RM3,000,000 per annum, which the applicants have paid for twelve consecutive years, is one which is unreasonable. Hence, this court finds the first and fifth respondents therefore have failed to rebut the applicants' entitlement under this head.

[78] It is the considered view of this court that the applicants' claim under this head, in the amount of RM36,000,000, ought to be allowed.

Additional Costs Incurred For The Development Of "Industrial And Business Scheme Project" In Parts Of The Bukit Tagar Lands At The Request Of The First Respondent (RM46,618,925.57)

[79] The applicants acted upon the requirement of the EXCO which was given *vide* the 2011 letter through the State Secretary of the first respondent. They had proceeded to apply for and had obtained the necessary approval for the implementation of the "Industrial and Business Scheme" project on the Bukit Tagar lands. The applicants claimed that this is a legitimate expectation which the applicants had acted upon, and therefore they are entitled to this head of claim.

[80] The quantum the applicants sought for is in the amount of RM46,618,925.57. This figure was derived from the total costs and expenses incurred by the applicants in the implementation of the "Industrial and Business Scheme" project. Details of the amount are as follows:

(i) a total of RM14,375,167.42 being the land cost;

(ii) professional fees in the amount of RM1,768,436.48;

(iii) contract works incurred RM30,330,150.79;

(iv) statutory contributions attributed RM69,020.06 of the total claim; and

(v) direct expenses and marketing expenses in the amount of RM31,350.82 and RM44,800 respectively.

[81] In rebuttal, the first and fifth respondents averred that there was no guarantee that the STC relocation proposal would be approved. The first and fifth respondents approved the implementation of the "Industrial and Business Scheme" project based on the application submitted by the

applicants on their own volition and there is no strict undertaking (akujanji tegas) given that the applications for development of the applicants will be approved. The first and fifth respondents further averred that they have conducted a site inspection on the lands concerned and found that the lands are still mainly vacant and only infrastructures such as road, drainage and streetlights are built. Furthermore, the category of land use on the lands concerned for the implementation of the "Industrial and Business Scheme" project is still under "agriculture" and therefore, the first and fifth respondents challenged the veracity of such implementation.

[82] There were in fact representations by the first and fifth respondents, and the applicants had indeed acted upon such representations and spent a substantial sum of money to achieve such ends. It is both reasonable and not remote that the first and fifth respondents ought to have known the consequence of the failure on their part to perform their public duty. This court finds no reason to not to allow the entitlement of the applicants under this head.

[83] Nonetheless, it has not escaped the attention of the court that the applicants are essentially claiming the whole expenditure incurred for the implementation of the "Industrial and Business Scheme" project. On close scrutinisation of the documents exhibited in the applicants' affidavit in support (3) (encls. 133 and 134) reveal that the portion of lands used for the purpose of "Industrial and Business Scheme" project, which the applicants had purported to have borne the land cost incurred, is actually a transfer being exercised internally, from Berjaya City's HQ Division to Berjaya City's "property division". There was no actual transfer of ownership. The applicants too failed to adduce any valuation report to substantiate the amount of RM14,375,167.42 being the value of the lands involved.

[84] In the assessment of damages, it is not beyond the jurisdiction of this court to consider the possibility of the happening of certain events. Edgar Joseph Jr SCJ had hold in the case of *Tan Sri Khoo Teck Puat* (*supra*) that at p. 26:

> But, in this mortal world virtually anything is possible, and the correct approach for the Judge to have adopted when assessing damages, which depends upon a view of what will happen in the future, *is that the Court must make an estimate as to what are the chances that a particular thing will happen, and whether they are more or less than even.* In this, we are supported by the following passage in the judgment of Lord Diplock in *Mallett v. McMongale* [1970] AC 166 (at p.176):
>
> > The role of the Court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a Court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. *But in assessing damages*

> *which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the Court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.*
>
> Had the Judge adopted this approach, as he undoubtedly should have – looking ahead over a period of some eight years commencing in 1993, with the increase in the cost of construction, both in terms of material and labour, not forgetting that land is always deemed in law to have a special value and is in the nature of things, absolutely limited, given continuing political stability, the chances of the price of houses increasing was, part of "the ordinary course of things", and so, in the words of Lord Diplock, "more than even". Such an approach would have supported Miss Lim's projections. (emphasis added)

[85] The implementation of the "Industrial and Business Scheme" project was the act of the applicants pursuant to the expectation they derived from the representations found in the 2011 letter. However, one must not disregard the possibility on the profits generated by the applicants, in consequence of the implementation of such project. As much as the applicants have incurred costs and expenses in the implementation of the said project, it is not improbable to assume that the applicants will not be able to recover all costs incurred from the proceeds of sale of the properties that are the subject of such project. The lands subjected to the implementation of such project, and the project in its overall, will still benefit the applicants, not the first and fifth respondents.

[86] If the applicants are treated as having suffered loss in consequence of the implementation of the "Industrial and Business Scheme" project, a situation which is not at all impossible should the market condition turn unfavourable, what the applicants should have done is to satisfy this court that there are losses suffered from the difference of the applicants' profit in having the said project being implemented on the Bukit Tagar lands, compared to the situation if the said project is not required to be implemented at all.

[87] Guided by the principles of *Batu Kemas* (*supra*), the applicants, *albeit* successfully proved that they are entitled to damages under this head, cannot be said to have satisfied the threshold that they are entitled to the amount claimed.

[88] The applicants however, are not completely being shut out of any compensation. As found by S Nantha Balan JCA in the Court of Appeal case of *National Feedlot* (*supra*), the applicants may be entitled to nominal damages:

> [130] Since the plaintiffs have failed in their claim for substantial or any damages, the question is whether we should award nominal damages. In *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 1 CLJ 611; [2007] 2 MLJ 229, the Court of Appeal held:

> [87] *Nominal damages may be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given.* Although this is one of many situations in which nominal damages may be awarded, *'it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss'* (see *McGregor on Damages*, Chapter 10).
>
> [88] In the instant case, the issue is one of proof rather than absence of loss. It is an absence of evidence of the amount of loss.
>
> [89] As Lord Halsbury LC succinctly stated in *The Mediana* [1900] AC 113:
>
> ... Nominal damages is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.
>
> [90] In the instant case, we find that the respondent has clearly failed to prove this loss which was allegedly suffered from the appellant's breach of contract. In a situation where there is an infringement of a legal right such as this but where there is no basis for ascertainment of the amount of loss suffered, a nominal damage may be awarded (see *Sykes v. Midland Bank Executor & Trustee Co Ltd* [1971] 1 QB 113).
>
> [131] As the plaintiffs have succeeded on liability but have failed to prove damages, we are of the view that we should order nominal damages. We therefore award a sum of RM10,000 as nominal damages with interest thereon at 5% per annum from 22 May 2012 until the date of full payment or realisation.

[89] Reverting to this case, whether or not the sales of the "Industrial and Business Scheme" project will generate profit to the applicants, it cannot be denied that the applicants initially had no plan at all to implement such project. If it were not for the representation of the first and fifth respondents, the applicants would not have to implement such project. The applicants are not entitled to the quantum they sought for the reasons adumbrated above, but the applicants ought to be entitled to nominal damages. Taking into account the scale of the "Industrial and Business Scheme" project, an amount of RM2,330,946.30 is not at all unreasonable, being compensation for the time spent and effort put into, being 5% of the amount claimed by the applicants under this heading.

[90] In the upshot, the applicants should be entitled to a nominal damage of an amount of RM2,330,946.30 under this head.

"Loss Of Appreciation In Land Value" Having Development Potentials And "Loss Of Opportunity" To Develop Lands In Bukit Tagar Land Amounting To An Area Of 11,098.04 Acres (RM1,591,244,600)

[91] The applicants claimed that due to the inaction on the part of the first and fifth respondents, the applicants had to dispose of certain Bukit Tagar lands ("disposed lands") prematurely, in the undeveloped state and logically at a much lower market price, due to the "uncertainty" of the STC relocation proposal. The applicants claimed that but for the delay on the part of the first and fifth respondents, the disposed lands would have fetched a far higher value. The applicants averred that as a result they suffered loss of appreciation of land value as well as loss of opportunity.

[92] The applicants appointed CBRE for the purpose of calculating the losses suffered in respect of the disposed lands, and claimed for an amount of RM1,591,244,600. In deriving such figure, CBRE had assumed that (see p. 21 of encl. 133):

(i) all approvals required for the proposed development in Bukit Tagar have been approved; and

(ii) the STC relocation had been completed in year 2010.

[93] It is observed that the applicants had proceeded on the presumption that the STC relocation proposal would have been approved if re-tabled at the NPPC. This is in contravention with the findings above that the whole cause of action being the subject of the instant application judicial review is founded upon the failure on the part of the first and fifth respondents to cause the STC relocation proposal to be re-tabled at the NPPC, and not the failure of the NPPC to approve the STC relocation or that the STC relocation is ordered to be approved.

[94] The presumption of the CBRE too runs foul with the proposition of the applicants that the disposed lands were disposed of due to the "uncertainty" of the STC relocation proposal.

[95] CBRE in its report had adopted the comparison approach in deriving to the figures claimed by the first and fifth respondents under this head. CBRE had identified certain lands which are of the category of agriculture with development potential, and assessed the value of those lands as at 31 January 2024. CBRE then found the difference between the price the disposed lands when they were being disposed, and the value of the lands which CBRE had identified.

[96] The lands were disposed on 11 August 2014 and 28 October 2014. According to the applicants, they had disposed of the disposed lands due to the "uncertainty" of the STC relocation proposal. In other words, it can be said that the applicants in exercising the option to sell off the disposed lands, had took into the necessary consideration including the viability of the

project intended to be commenced on the Bukit Tagar lands as a whole. This is a risk the applicants must necessarily bear in making their commercial decision.

[97] It is therefore cannot be that for the first and fifth respondents be placed in a situation where they would have to bear the consequence of certain actions which the applicants chose to take on their own accord. It follows that by their conduct the applicants must bear any risk that must necessarily ensue. The risk includes the loss of opportunity or the loss of enjoying the benefit in the appreciation of land value.

[98] This court is satisfied the first and fifth respondents cannot be said to have caused the applicants to dispose of the disposed lands at the price they have agreed with the purchasers of the disposed lands.

[99] Hence, the applicants' claim on this head must be dismissed.

Interests

[100] Having assessed the compensation payable by the first and fifth respondents, it is necessary for the court to identify on the issue of interests.

Pre-Judgment Interest

[101] Pursuant to s. 11 of the Civil Law Act 1956, this court has the power to award interests from the date where the cause of action arose up until the date of the judgment.

[102] The case of *Batu Kemas* (*supra*) is instructive. Choo Kah Sing JCA speaking for the Court of Appeal stated the following:

> [7] On the award of pre-judgment interest, … **An award of pre-judgment interest is not as of right in law.** The statute grants the court the discretion whether to award such interest as it thinks fit. The operative words used in the statute are "the court may, if it thinks fit". The period in which the court may consider to award interest is between the date when the cause of action arose and the date of the judgment.
>
> [8] We note the Federal Court Order dated 26.4.2018 did not mention pre-judgment or post-judgement interest to be awarded. The apex court gave a very specific instruction to the High Court (see paras 3 and 4 of the Federal Court Order in paragraph [54] of this Judgement).
>
> It is not wrong for the learned High Court judge not to grant any pre-judgment interest in his judgment, but to follow the instruction strictly from the Federal Court to only consider those items as directed in its Order. On this score, we see nothing plainly wrong has been committed by the learned High Court judge in not exercising his discretion to award prejudgment interest. (emphasis added)

[103] Similarly in the instant case, the Federal Court did not order for a pre-judgment interest to be awarded. This court is of the view that the applicants should not be entitled for the pre-judgment interest on the ground that the applicants' claim against the first and fifth respondents is in relation to the failure on the part of the first and fifth respondents to exercise their public duty. This is not a case where the claim is founded upon the breach of contractual duty or tort. Until the decision of the Federal Court, the parties' position as to their respective liability was unsettled. The first and fifth respondents in the view of this court, cannot be liable to pay interests upon such damages that they are not aware that they are liable.

Post Judgment Interest

[104] Order 42 r. 12 of the Rules of Court 2012 provides that all judgment debt shall carry interest to be calculated from the date of judgment until the judgment is satisfied. In this regard, the Court of Appeal in *Batu Kemas* (*supra*) found that:

> [11] Based on the above Rules of Court, post-judgment interest is a statutory interest, as opposed to pre-judgment interest which is based on the judge's discretion. …
>
> [12] A party could not be held liable to pay interest until the party knows what is the judgment debt that he must pay. In the event he fails to pay the judgment debt that he is liable to pay, then it is justified for interest be imposed on the outstanding judgment debt until the judgment debt is satisfied.
>
> [13] Further, once a judgment debt is ascertained and is not satisfied, this means the winning party has been deprived of the enjoyment of the judgment debt. For this reason, it is just that interest be awarded on the ascertained judgment debt if it is not satisfied.

[105] Based on the foregoing, this court allows the post-judgment interest. The first and fifth respondents are hereby ordered to pay interest at the rate of 5% per annum chargeable on the judgment debt to be calculated from the date of assessment until the date of full settlement thereof.

Costs Of Assessment

[106] Costs to be payable by the parties.

Conclusion

[107] In the upshot, this court found the applicants shall be entitled to:

No.	Head of Claim	Amount (RM)
1	Loss of profit in developing the Sungai Besi Land.	Nil
2	Increase in cost of construction of the New Equestrian Centre at the Sungai Tinggi Land.	Nil
3	Annual compensation paid to STC as consideration for the extension of SPA.	36,000,000.00
4	Additional costs incurred by the Applicants for the development of "industrial and business scheme project" in parts of Bukit Tagar Land at the request of the First Respondent.	2,330,946.30
5	"Loss of appreciation in land value" having development potentials and "Loss of opportunity" to develop lands in Bukit Tagar Land amounting to an area of 11,969.09 acres which had to be disposed of by Berjaya City at a much lower value due to the uncertainty of the relocation of the STC due to the action/inaction/failure of the Respondents	Nil
6	Pre-Judgment Interest	Nil
7	Post-Judgment Interest	5% of the sum of item 1 to 5 above
8	Cost of Assessment	Each party to bear their own costs